

Memorandum 2008-12

2008 Legislative Program: Status of Bills

For the most part, the Commission's legislative program is proceeding well. The procedural status of each bill is indicated on the attached chart. It will be updated orally at the meeting.

This memorandum provides additional detail on matters requiring Commission attention. It also discusses a bill that would assign the Commission a new study, on an urgency basis.

AB 1921 (SALDAÑA): RECODIFICATION OF CID LAW

Assembly Bill 1921 (Saldaña) would implement the Commission's recommendation on *Statutory Clarification and Simplification of CID Law* (Dec. 2007). The bill has been approved by the Assembly and is now pending in the Senate. Issues relating to this bill will be presented in a supplement to this memorandum.

**AB 2166 (TRAN) — TRIAL COURT RESTRUCTURING:
APPELLATE JURISDICTION OF BAIL FORFEITURE**

Assembly Bill 2166 (Tran) would have implemented the Commission's recommendation on *Trial Court Restructuring: Appellate Jurisdiction of Bail Forfeiture* (Dec. 2007). The bill would have clarified the jurisdiction of bail forfeiture appeals, preserving pre-unification procedures but making them workable in the context of a unified trial court.

Despite extensive staff efforts, the bill was not approved by the Assembly Committee on the Judiciary and is now dead. The staff will provide additional detail orally, at the meeting.

AB 2193 (TRAN): DEPOSITION IN OUT OF STATE LITIGATION

Assembly Bill 2193 (Tran) would implement the Commission's recommendation on *Deposition in Out-of-State Litigation* (Dec. 2007). The bill has been approved by the Assembly and is now pending in the Senate.

The staff is not aware of any opposition. There is, however, a minor complication: The bill needs to be coordinated with another pending bill, AB 926 (Evans).

In particular, one of the provisions in AB 2193 is proposed new Code of Civil Procedure Section 2029.200, which provides:

2029.200. In this article:

....

(e) "Subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to do any of the following:

- (1) Attend and give testimony at a deposition.
- (2) Produce and permit *inspection and copying* of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person.
- (3) Permit inspection of premises under the control of the person.

(Emphasis added.) AB 926 would amend many discovery provisions to permit "inspection, copying, testing, or sampling" instead of just "inspection" or "inspection and copying." Thus, if AB 926 is enacted and expands permissible discovery to include "inspection, copying, testing, or sampling," such a change should also be made in proposed new Code of Civil Procedure Section 2029.200(e)(2).

Specifically, under those circumstances, proposed Code of Civil Procedure Section 2029.200(e)(2) should read:

(2) Produce and permit *inspection, copying, testing, or sampling* of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person.

Amendments of AB 2193 to achieve this result are in preparation and have been circulated to key contacts. The revision of subdivision (e)(2) would be contingent on enactment of AB 926 and its current approach to "inspection, copying, testing, or sampling." The author plans to offer the amendments as author's amendments when the bill is heard in the Senate Judiciary Committee

on June 10. The staff recommends that **the Commission approve those amendments.**

A similar change would be necessary in the Comment:

Comment. Section 2029.200 is the same as Section 2 of the Uniform Interstate Depositions and Discovery Act (2007), except that (1) the definition of “foreign jurisdiction” in subdivision (a) includes a foreign nation, not just a state other than California, ~~and~~ (2) the term “Virgin Islands” is substituted for “United States Virgin Islands” in subdivision (d), because “Virgin Islands” is the official name for the entity in question, and (3) subdivision (e)(2) refers to “inspection, copying, testing, or sampling,” instead of only “inspection and copying”.

....

The staff recommends that **the Commission approve this revision of the Comment, contingent on enactment of AB 926 and its current approach to “inspection, copying, testing, or sampling.”**

AB 2299 (SILVA) — TECHNICAL AND MINOR SUBSTANTIVE STATUTORY
CORRECTIONS: REFERENCES TO RECORDING TECHNOLOGY

Assembly Bill 2299 (Silva) would implement the Commission’s recommendations on *Technical and Minor Substantive Statutory Corrections: References to Recording Technology*, 37 Cal. L. Revision Comm’n Reports 211 (2007).

The bill was amended on May 5, 2008, to make a few technical changes. The most significant amendments were made to Civil Code Sections 916 and 922. The existing versions of those sections refer to building inspections being “electronically recorded, videotaped, or photographed.” In the Commission’s recommendation, those provisions would be amended to allow a building inspection to be “video recorded or photographed.” The assumption was that “electronic recording” was subsumed within the general authority to video record and photograph.

The staff now believes that the proposed revisions might substantively narrow the scope of what is allowed. There might be forms of electronic recording used in building inspections that do not involve video or photographs. Out of caution, the staff recommended that the provisions be amended to track existing language more closely, i.e., to allow a building inspection to be “electronically recorded, video recorded, or photographed.” No Comment revisions are required to conform to these amendments.

In addition, AB 2299 was amended to subordinate the effect of the bill to any other bill enacted this year that affects the same code sections. This is a routine courtesy when a purely technical bill affects a large number of sections. Without the subordination language, our purely technical changes could “chapter out” another bill’s substantive changes.

The staff recommends that the Commission ratify these amendments.

In addition, the staff discovered a typographical error in the Comment to Government Code Section 27491.47. **The staff recommends that the Commission approve the following revised version of that Comment:**

Comment. Section 27491.47 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

That revised version will be used in future communications with the Legislature and the Governor regarding this bill and will be provided to legal publishers, as a replacement for the erroneous comment.

SB 1691 (LOWENTHAL) — MECHANICS LIEN LAW

Senate Bill 1691 (Lowenthal) would implement the Commission’s recommendation on *Mechanics Lien Law* (Feb. 2008). The bill has been approved by the Senate and is now pending in the Assembly. Further detail on this bill will be provided in a supplement to this memorandum.

PROPOSED COMMISSION STUDY

As amended on March 24, 2008, Assembly Bill 1868 (Walters) would have provided that a charter school is a public entity for the purposes of the law governing public entity tort liability.

AB 1868 was amended again in the Assembly Committee on the Judiciary. The content of the bill was removed and replaced with a provision directing the Commission to study the policies served by existing law on public entity tort liability, and the extent to which a charter school resembles a public entity in relation to those policies.

In its current form, the bill provides as follows:

SECTION 1. Section 811.3 is added to the Government Code, to read:

811.3. (a) The California Law Revision Commission shall submit a report to the Legislature, on or before December 1, 2008, that addresses the following matters:

(1) A general description of the policy purposes served by this division.

(2) A general discussion of the possible consequences of adding charter schools to the list of public agencies covered by this division and whether charter schools possess the characteristics of a public entity that are relevant to the policy purposes served by this division, including a discussion of whether these considerations differ depending on whether the charter school is operated as or by a public entity, or an independent nonprofit or for-profit corporation.

(3) A general discussion of the differences between charter schools and district schools as they relate to the policy purposes served by this division.

(b) In this report, the California Law Revision Commission shall not make any recommendation on whether charter schools should be treated as a public entity for the purposes of this division.

(c) The State Department of Education is requested to provide reasonable assistance to the California Law Revision Commission in complying with the requirements of this section, including providing background information on the history and nature of charter schools in California.

(d) The Department of Justice is requested to provide reasonable assistance to the California Law Revision Commission in complying with the requirements of this section, including providing background information on governmental tort liability.

SEC. 2. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to protect charter schools from imminent financial harm as a result of a recent Court of Appeal decision, *Knapp v. Palisades Charter High School* (2007) 146 Cal. App. 4th 708, which held that charter schools are not public agencies for purposes of the Tort Claims Act (Division 3.6 (commencing with Section 810) of Title 1 of the Government Code), it is necessary that this act take effect immediately.

As indicated in Section 2, AB 1868 is an urgency measure. Assuming that it is enacted (as seems likely), it will take effect immediately on being signed by the Governor. There is a good likelihood that the bill will not be enacted until mid-August. As soon as the bill is signed, the Commission could start work on the study — but not before then. The Commission does not currently have authority

to study government tort claims or charter schools. AB 1868 would grant that authority.

Given the fact that AB 1868 was referred to three committees in the Assembly (Education, Judiciary, and Appropriations), it will likely face a lengthy process in the Senate as well. Consequently, the bill may not be enacted before the Legislature's summer recess begins. (The recess is scheduled to start on July 3, 2008, but the recess will be delayed if a budget has not yet been approved by that date.) If the bill is not approved before the recess, it could not be enacted until early August, after the Legislature reconvenes (on August 4, 2008).

The extremely short December 1 deadline imposes three practical constraints on the Commission:

- (1) Work should begin on this project as soon as the Governor signs the bill. **For that reason, the Commission should discuss and provisionally approve a general method of proceeding that the staff can initiate when the bill is signed.**
- (2) It may be necessary to postpone the August 15, 2008, meeting, as discussed in Memorandum 2008-30. This would ensure that the Commission would have two scheduled meetings to work on this study before the deadline for completion.
- (3) The Commission cannot follow its ordinary process. With only two meetings to consider the topic, it would not be possible to prepare a tentative version of the report and circulate it for public comment. Instead, the staff will need to work closely with the main interest groups from the start, and incorporate their perspectives into the draft report. The final report should include a caveat section making clear that time allowed for completion barred the Commission from soliciting public input.

Fortunately, the Commission is not required (or permitted) to make any final recommendation on whether charter schools should be treated as public entities with respect to tort liability. The time provided is far too short for the development of a useful recommendation on this thorny question.

Respectfully submitted,

Brian Hebert
Executive Secretary

